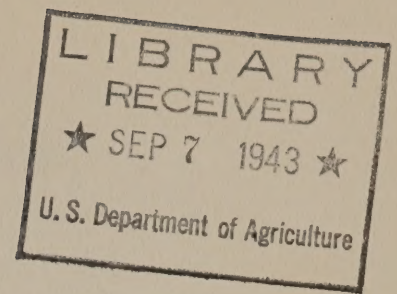


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WISCONSIN STATE MILK CONTROL ACT

Paper No. 13. Series on State Milk Control Acts,
Dairy Section, Agricultural Adjustment Administra-
tion, United States Department of Agriculture.

March 31, 1938.

INTRODUCTION

This is the thirteenth of a series of papers designed to make available, in a condensed and convenient form, information concerning State milk control acts, the type of regulation issued thereunder, and, in general, the legal developments in connection with their administration and enforcement.

The series, to date, includes a paper on each of the following State controls: Indiana, Alabama, Connecticut, California, New Jersey, Virginia, New York, Pennsylvania, Rhode Island, Vermont, Massachusetts, and New Hampshire. Other papers are in process of preparation, there being at the present time some twenty States having milk control laws.

It is expected that a general summary of all the State acts and regulations will be prepared when the review of individual State acts and regulations is completed. In this connection some comparison may be made. These papers omit much detail which might be helpful to those concerned with legislative or administrative problems of State milk control. Those who desire more complete information will undoubtedly find it to their advantage to get in touch with the officials charged with the administration of these acts.

STATE MILK CONTROL IN WISCONSIN
THE ACT, ITS ADMINISTRATION AND LEGAL STATUS

PART ONE

I. General Character of Legislation.

Temporary emergency laws specifically designed for the stabilization of fluid milk markets in Wisconsin were first enacted in 1933^{1/}, and continued in somewhat amended form in 1935^{2/} and 1937.^{3/} The present law ceases to be of force or effect after December 31, 1939, or earlier in the event that the Department of Agriculture and Markets "shall determine^{4/} that economic unbalance or unemployment no longer so materially interferes with the ability to produce, to consume, to bargain, or to deal in the production or distribution of fluid milk in Wisconsin as to continue measurably to threaten" certain results, including (1) the financial demoralization of producers and dealers, (2) the continued ability of producers to produce an adequate supply of milk of a sanitary and safe quality and of dealers to distribute it in a sanitary and safe manner, and (3) the public health and welfare.

Type of Governing Agency

The responsibility for regulating fluid milk markets in Wisconsin has from the start been placed in the Department of Agriculture and Markets. The department has an adequate personnel of assistants and employees, including an assistant attorney-general, who may be required to devote his entire time to the work of the department, marketing specialists, chemists, veterinarians, auditors, inspectors, clerical workers and others whose services, like those of the commissioners, are paid for out of State appropriation funds.

Conditions Under Which Powers of Department May Be Exercised

The department is granted jurisdiction upon its own initiative

^{1/} In April 1933, by section 99.165, the Department of Agriculture and Markets was empowered to fix both producer prices and resale prices of milk, and by section 99.43, enacted two months later, was charged with the duty of licensing milk dealers in the State.

^{2/} By sections 99.165 and 99.43, renumbered as sections 100.03 and 100.04, respectively.

^{3/} By section 100.03 - a consolidation of sections 100.03 and 100.04 of the laws of 1935.

^{4/} The department's determination, to whatever effect, shall be in the form of a general order and may be reviewed as such and not otherwise.

or upon petition in writing "to inquire into and determine the regulated milk markets^{5/} of the state," and "to prescribe such terms and conditions for the purchasing, receiving, handling or selling of regulated milk in any such market as it shall find necessary to eliminate unfair methods of competition or unfair trade practices."

In the extent to which the department may upon its own motion exercise its powers, the present law differs considerably from the previous statutes. The act of 1933 applied only to cities of the first, second, and third class, except under certain specified conditions; the act of 1935 added to the applicable territory subject to control, cities of the fourth class if having at least 5000 population; but as to areas of less than 5000 (with certain exceptions) the law required as a prerequisite to the exercise of authority by the department, that there must first be a written favoring petition by (1) a majority of the producers supplying milk and cream for fluid distribution for such area or (2) a majority of the dealers distributing such milk and cream in such area, together with notice, publication, and public hearing with respect to any such petition. In the present act there is no provision of this nature.^{6/}

Source of Financing

Under the present law (section 100.03), the cost of administering its provisions is met by a deduction by each dealer from the price^{7/} to his producers. Although the subsection requiring this check-off terms it "an amount sufficient to administer this section" (thus seeming to exclude the money received from dealers' annual license fees), it is provided in another statute (20.60 (19), Statutes of 1937) that "all moneys" collected under section 100.03 and any balance of moneys collected under sections 100.03 and 100.04 (Laws of 1935) shall be available "as a non-lapsible appropriation for the execution of said section." As regards the deduction, the amount shall be at the same rate "for all markets"

^{5/} "Regulated milk," as defined, "means fluid milk and fluid cream, whole or skimmed, and with or without added ingredients, buttermilk, and cottage cheese, and all milk and cream received by any dealer, as to any of which, directly or indirectly, the conditions described in subsection (2) exist in any particular regulated milk market." Note: "the conditions described in subsection (2)" are the conditions outlined in the opening paragraph and next succeeding paragraph of this paper.

"Regulated milk market," as defined, "is any area within which as to the distribution of regulated milk, the conditions described in subsection (2) exist."

^{6/} For court rulings with respect to favoring petition, see PART THREE.

^{7/} "Price," as defined, "includes the amount to be charged or paid, and the proceeds to be delivered, and shall be money or property presently paid, delivered or vested indefeasibly in the person entitled thereto, as the price order shall provide."

(presumably "for all regulated milk markets"), and shall not exceed one cent per 100 pounds of fluid distribution.^{8/} The dealer's annual license fee is \$10.^{9/}

Statutory Protective Provisions

The constitutionality of the act is sought to be protected as a whole by the inclusion of a partial invalidity (severability) clause, to the end that should one or more provisions or exceptions in the statute be declared invalid, the remaining provisions and exceptions shall thereby be unaffected as to their validity. The act does not contain the so-called "interstate commerce clause" providing that nothing in the act shall be construed as applying to interstate or foreign commerce except as may be permitted under the Federal Constitution and laws thereunder enacted.

II. Regulatory Provisions.

Powers of the Department of Agriculture and Markets^{10/}

Investigation.- The duty (explicit or implied) of the department to determine whether "economic unbalance or unemployment . . ." continues to exist, or no longer exists, to the extent and in the manner necessary to justify continuation of the act, could not be complied with most effectively without extensive powers of investigation; nor is it probable that the act as a whole could be effectively administered by any regulatory body denied such powers. The act,

^{8/} "Fluid distribution" means "the part of the producers' deliveries that is equal to the proportion of the entire receipts of the dealer distributed in actual fluid form plus the milk equivalent of fluid cream distributed, including milk produced by the dealer."

^{9/} Under the 1933 act the cost of fluid milk control was assumed by the department, paid from State appropriations, and thus ultimately borne by the taxpayer; no special appropriation was made for it, and department funds were found inadequate. Under the 1935 law the cost was paid in part by the milk producers (under provision similar to the present check-off plan which must not exceed one-half cent per 100 pounds of all milk bought, received, or handled by dealers subject to the requirements of the act) and in part from dealer license fees of \$2 each, annually.

In addition to the one-cent deduction under the present section, the department may order a further deduction from the price to producers of not more than one-half cent per 100 pounds of fluid distribution, in any regulated milk market "when conditions in such market show need for such expenditures to promote increased consumption," and in such case dealers also shall contribute, as their share, an equal amount. This advertising fund shall be used by the department "with the advice of a local committee of producers and dealers."

^{10/} That is, its powers under this act (section 100.03) and other acts applicable thereto, particularly certain sections of Title XII covering activities of the Department of Agriculture and Markets.

although empowering the department to inquire into and determine the regulated milk markets of the State and "to inquire into any matter pertinent to regulation under this section in any such market," hints at^{11/} rather than specifies the mechanisms through which "inquiry" (investigation) may be made; it is necessary to turn to other sections of Title XII to determine the full scope of the department's investigatory authority.

Under Chapter 93 the department has authority with respect to any matter within the scope of its power and/or relevant to any matter which it may investigate, administer or enforce, (1) to enter, within reasonable hours, any and all kinds of premises within the State (under Chapter 97 barns, factories, dairies, etc., are specified for free access); (2) to conduct hearings, administer oaths, issue subpoenas and take testimony; (3) to require sworn or unsworn reports or answers to specific questions; and (4) to have access to and to copy any document,^{12/} or any part thereof, which is (a) in the possession or (b) under the control of any person engaged in business.^{13/}

Licensing powers.- The act (section 100.03) prohibits every person from engaging in business as a dealer^{14/} "without a license therefor under this section," - except a producer "distributing milk only and not to exceed ten quarts daily," and except that a dealer not bottling milk or cream in any fluid form shall not be required to be licensed for the operation of a grocery or delicatessen store, meat market, bakery, confectionery store or restaurant. Application for license must be in writing and under oath, giving such "pertinent" information, in such form, as the department shall require. A fee of \$10 shall accompany the application, to be retained by the department whether or not a license is issued. Expiration date for all licenses is December 31 in the year for which issued.

^{11/} Viz., in the provision that no person shall be excused from testifying, from making answer or report, or from producing any paper, record, document, or other evidence, "in any examination, inspection, proceeding or requirement in pursuance or enforcement of this section, including civil contempt, on the ground of tendency to incriminate"; but no person so complying shall be prosecuted, "except for perjury, false swearing, false report or false answer," in any criminal or forfeiture proceeding for or on account of any transaction, matter or thing as to which he may have produced evidence tending to incriminate him.

^{12/} "Documents," as defined, "includes books, papers, accounts, records and correspondence."

^{13/} "Business," as defined, "includes any business, except that of banks, building and loan associations, insurance companies and public utilities."

^{14/} "Dealer," as defined, "means any person buying for resale or receiving, handling or selling, either personally or through an agent or as agent of another, either at wholesale or retail, regulated milk in a regulated milk market."

Only persons "making proper application" and who are "fit and equipped for the business" shall receive a dealer's license - the department determines that point, and a license may not only be denied but also suspended or revoked by special order, after "notice and hearing" as provided elsewhere in Title XII (section 93.18), when the applicant is found unfit or unequipped for the business. In applying these criteria the department shall consider, "in addition to other matters," (1) the character and conduct, including past compliance or noncompliance with law,^{15/} of the applicant or any person to be connected with the business, and (2) the applicant's financial responsibility.

Dealers may be bonded.- The department may at any time require an applicant or licensee to file with it a surety bond "conditioned for the prompt delivery of the price to producers."

Records and reports.- As indicated in footnote 11, no person shall be excused from making answer or report. . . . Specifically, in Chapter 93 the department is empowered to prescribe a form of statement to be used at each regular payment date by every milk-receiving plant (as well as by every cheese factory, butter factory or condensery) to every person from whom milk is bought or received "on a butterfat or cheese basis," and may, by general or special order, require "persons engaged in business" to file with the department, "at such time and in such manner as the department may direct," sworn or unsworn reports or answers to specific questions, "as to any matter which the department may investigate." Elsewhere in Chapter 93 it is made the duty of the department to prescribe forms for all applications, notices and reports required to be made to the department "or which are necessary in its work."

As to records, the department is not specifically authorized to prescribe them in the act nor, apparently, in any section under Title XII.^{16/}

Cooperation with other authorities not specified.- The act contains no provision conferring authority upon the department to cooperate with milk control authorities of other States or with agencies of the Federal Government in any matters, including problems with respect to stabilization of fluid milk and cream.

Mediation and arbitration not specified.- Authority to arbitrate or mediate in disputes among or between producers, their cooperatives and milk dealers is not specifically provided for nor inferentially contained in the act or elsewhere under Title XII.

^{15/} For example, any of the laws under Title XII applicable to a milk dealer, as the requirements as to cleanliness of premises, utensils, cans, bottles, etc., or the prohibitions as to insanitary or adulterated milk; or any applicable health law.

^{16/} Reports prescribed in form and required to be made by legal authority may, by adoption, become records for those making such reports.

Prices to be paid producers and to be charged by dealers.- In any "regulated milk market" (see footnote 5) the department, as one of the terms and conditions for the buying, receiving, handling or selling of "regulated milk" (see footnote 5), may prescribe schedules of prices "for producers, dealers and consumers, or either, and labeling." These schedules of prices, as well as the other "terms and conditions," shall be such as the department "shall find necessary to eliminate unfair methods of competition or unfair trade practices." In the act of 1933 and of 1935 there was the requirement that all prices fixed should be "just and reasonable," but express provision is absent from the present act.17/

Method of payment to producers.- The act does not specify any method by which producers shall be paid, but leaves it to the department to prescribe "terms and conditions" for the buying and the receiving (as well as the handling or selling) of regulated milk in a regulated milk market; provided, however, that the "terms and conditions" shall be found necessary to eliminate unfair methods of competition or unfair trade practices. In prescribing "terms and conditions" the department is required to "consider" among other things the terms of any "collective bargaining agreement" arrived at between producers and dealers. The department may include in its orders "provisions reasonably necessary to prevent circumvention of the terms and conditions" of such orders. As noted above, "labeling" may be included as one of the terms and conditions, and refers to the labeling of the milk to reflect the different resale price brackets, insofar as the department shall so require.18/

Unfair Methods of Competition and Unfair Trade Practices

In addition to provisions in the act previously noted with respect to unfair methods of competition and unfair trade practices, the department is empowered under sections 100.19 and 100.20 "concurrently with this section" (100.03) "to make effective the elimination" of such methods and practices in connection with the distribution of regulated milk. Section 100.19, in substance, provides: (1) That the methods of distribution and practices in the distribution of food products (and fuel) "shall be free from needless waste and needless duplication which tend to increase the cost of such products to the consuming public," and if not free from these defects such methods and practices shall be prohibited; (2) that the department may, after public hearing in each instance, issue (a) general orders forbidding such methods and practices and prescribing those found to avoid waste or duplication as defined, and (b) a special order against any person, 19/

17/ Only minimum producer and minimum resale prices have been fixed by the department under the acts of 1933, 1935, and 1937.

18/ For methods of payment in actual administrative practice, see PART TWO.

19/ "Person," as defined in section 100.03, "means any individual, partnership, corporation or association, including any cooperative association."

enjoining him from employing any method or practice in distribution found by the department to cause waste or duplication as defined, and likewise by such special order requiring him to employ such method or practice found by the department to avoid waste or duplication as defined. Section 100.20 declares that methods of competition in business and trade practices shall be fair and prohibits those which are not. The department, after public hearing, may issue general orders or, in the case of individuals, special orders (1) forbidding, or enjoining any person from employing, such methods and practices as the department shall have determined unfair, and (2) prescribing or requiring the employment of such methods and practices as it shall have determined fair.^{20/}

Limitations and Exceptions

Limitation upon exercise of authority by the department, with respect to fluid milk and fluid cream, consists in the following: (1) The requirement that such authority shall apply only to "regulated milk" in any "regulated milk market," and (2) that the act shall not be construed as limiting the power of any municipality to license or to regulate the distribution of regulated milk "in any manner not inconsistent with this section or with an order or regulation of the department under this section."^{21/} As to exceptions in the law it may again be noted that certain ten-quart producers and certain operators of stores, restaurants, etc., are not required to be licensed.

Violation

Unlawful acts.- The term "unlawful" or "prohibited" does not appear in the act, and in only one instance is a direct prohibition made, namely, that no person "shall engage in business as a dealer without a license therefor under this section. . . ." Examination of other applicable sections, however, reveals, among other things, the following: (1) no person shall refuse or fail to render any report or answer required under section 93.15 at such time and in such

^{20/} It was under these permanent acts (section 100.20, formerly section 99.14 and section 100.19, formerly section 99.16) that the department, following a favorable opinion by Deputy Attorney General Wylie (22 Atty. Gen. 1036), first found authority to attempt stabilization of fluid milk marketing, including the fixing of minimum prices. This occurred in 1932, some months prior to the enactment of the Law of 1933 or of the milk control act of any other State.

^{21/} This is, in effect, a limitation of the power of the municipality rather than of the department.

manner as the department may prescribe; refuse, neglect or fail to submit, for the purpose of inspection or copying, any document^{22/} demanded under section 93.15^{23/}; wilfully fail to make full and true entries and statements in any report or answer required or document demanded under section 93.15, or for the purpose of embarrassing the department in the conduct of any investigation, hearing, or proceeding, remove out of the State or mutilate or alter any document, or, except through judicial process, resist or obstruct any official or subordinate of the department in the exercise of his lawful authority; (2) under section 97.37, it is "unlawful to sell or offer for sale, furnish or deliver, or have in possession or under control with intent to sell or offer for sale, or furnish, or deliver as food for man, or to any creamery, cheese factory, milk condensing factory, or milk or cream dealer any adulterated milk or adulterated cream, or any insanitary milk or insanitary cream as defined in section 97.36;" (3) under section 97.40, the manufacture for sale of any article of food for man from any insanitary milk or cream is prohibited; (4) under section 97.64, untrue, deceptive or misleading assertions or statements, made with intent to sell or increase the consumption of articles of food through any manner of advertising, are prohibited.

Penalties.- The act itself provides no penalty for the commission of unlawful acts or for the omission of acts lawfully required to be done; but elsewhere in the permanent laws relating to the powers and duties of the department such penalties are prescribed. For example, under section 100.26, Session Laws of 1937, for violating the licensing requirement under section 100.03 (the instant act) or for intentionally refusing, neglecting or failing to obey any general order made under section 100.03, the penalty for each such offense shall be a fine of not less than \$5 nor more than \$100, or imprisonment in the county jail for not more than 30 days, each day of violation constituting a separate offense; and for violating "any of the provisions" of sections 100.15, 100.19, 100.20 or 100.22, or for intentionally refusing, neglecting or failing to obey "any regulation" made under sections 100.19 or 100.20^{24/}, the penalty for each such offense shall be fine of not less than \$25 nor more than \$5,000, or imprisonment in the county jail for not more than one year, or by both such fine and imprisonment.

^{22/} "Documents," is defined to mean, in Chapters 93 to 100 and Chapter 129, "books, papers, accounts, records and correspondence."

^{23/} Section 93.15 is applicable to "persons engaged in business."
See footnote 13.

^{24/} As stated above, it is under sections 100.19 and 100.20 that the department under the instant act (section 100.03) is specifically given "concurrent" authority to make effective the elimination of unfair methods of competition and unfair trade practices in connection with the distribution of regulated milk.

Penalty of a different nature is found in section 100.24, wherein it is provided, among other things, that any domestic corporation which shall violate any order issued under section 100.20 "shall forfeit all the rights and privileges conferred by the laws of this state upon corporations and shall forfeit its charter," and in the case of a foreign corporation, for such violation, its license or authority to do business in Wisconsin shall, upon proof thereof in any court of competent jurisdiction, be canceled.

Legal Remedies

Department.-- The department is specifically authorized to begin and to prosecute actions "to enjoin violation of this section or any order thereunder." Such actions shall be in the name of the State in any court having equity jurisdiction.^{25/} This remedy "is not exclusive," however -- another way of stating that actions "at law," as well as "in equity," may also be initiated and prosecuted.

Aggrieved persons.-- Provisions for judicial review of orders or regulations of the department made under the act shall be as prescribed in Chapter 102 (Workman's Compensation Act) insofar as applicable. Section 102.23 (Chapter 102) provides that the findings of fact^{26/} made by the State authority acting within its powers shall, in the absence of fraud, be conclusive; and the orders either interlocutory or final, shall be subject to review only under specified conditions, among them, the following: (1) within 30 days from date of the order any person aggrieved thereby may commence action, in the Circuit Court for Dane County, against the State authority for the review of such order; (2) the authority shall serve its answer within 20 days after service of the complaint and submit its evidence, testimony, findings, order, etc.; thereupon, the court may enjoin or set aside such order, but only upon the ground (a) that the authority acted without or in excess of its powers, or (b) that the order was procured by fraud, or (c) that the findings of fact do not support the order.^{27/}

^{25/} It is declared immaterial that the equity jurisdiction specifically conferred upon such court be not broad enough to cover actions under this section.

^{26/} The instant act provides that all questions of fact shall be determined by the department in written findings; also that "determinations" with respect to regulated milk markets, price schedules, labeling, unfair methods of competition and unfair trade practices, and deductions shall be by general order in the manner provided in section 93.18. That section provides for notice and public hearing, service of special order or other process, etc. A person complained against is entitled to be heard in person, or by agent or attorney and shall have process of subpoena to compel the attendance of witnesses.

^{27/} "Supreme Court has no power to set aside Commission's award on ground that findings were made against great weight and clear preponderance of evidence." Hills D. G. Co. v. Industrial Commission, 217 W. 76; 258 N. W. 336.

Status of Cooperative Associations of Producers

Under several chapters of Title XII, broad powers of supervision and regulations over cooperative associations of producers (and others) are conferred upon the Department of Agriculture and Markets. The instant act being an integral part of Title XII, it was unnecessary in drafting the act to repeat provisions set forth with particularity elsewhere. The only reference to cooperatives found in section 100.03 is in the definition of "person" - defined to include "any cooperative association". The inclusion is important, especially in determining whether a cooperative is a dealer (and required to be licensed) as defined in the act. (See footnotes 5 and 14 for definition of "regulated milk market" and of "dealer". Also, "No person" (e.g., no cooperative) shall be excused from testifying or making answer or report, or from producing any paper, record, document or other evidence, in any requirement in pursuance or enforcement of the act. (For full text, see footnote 11.)

The definition of a cooperative association, including a cooperative under the instant act, is given in section 93.01(12), Title XII, and includes "any corporation which adopts the principles of a cooperative basis as defined in section 185.01 except banks, building and loan associations, insurance companies and public utilities". Section 185.01 defines "association" as "a corporation organized under this chapter", and "co-operative basis" as meaning one member - one vote, patronage dividends, and an eight-percent limitation on stock dividends; except that "deductions may be made as required or authorized by the law of this state, or, in the case of a foreign corporation, by the law of the state of such corporation's creation." In addition, in Chapter 133, entitled "Trusts and Monopolies", exemptions from certain restrictions in the law are accorded to "associations, corporate or otherwise, of farmers, gardeners or dairymen . . . engaged in making collective sales or marketing for its members or shareholders of farm, orchard or dairy products produced by its members or shareholders;" and "collective bargaining by associations of producers of agricultural products" is permitted "when such bargaining is actually and expressly done for the individual benefit of the separate member of each such association making such collective bargain."

Under Title XII, also, the department is authorized to "prescribe uniform systems of accounting . . . for co-operative associations to render report . . . to show the nature and volume of business, resources, liabilities, profits, losses", etc., and it may require any such association doing business in the State to file with the department a verified copy of its by-laws and of any "exclusive contract of sale or agency between the association and its members or patrons"; and in like manner may require such association, or one in process of organization, to file with the department a report of its promotion expenses. It may also, under certain conditions, investigate the management of any such association and make the facts relating thereto available to the members. In addition, the department may set aside "a portion" of such association's funds "as a co-operative educational fund." Finally, the State's declared policy (in Title XII) is to "assist in the organization and development of co-operative associations for production and marketing purposes along lines of dairy and other farm products."

PART TWO

I. Administrative Procedure, Rules, Regulations and Orders.

Extent of authority exercised in State.- Under authority of the milk control act, and the milk dealers' licensing act, of 1933, together with section 99.14 (now section 100.20) prohibiting unfair methods of competition and unfair trade practices, the department extended its authority over the fluid milk and fluid cream industry until it had established orders in 19 cities of the first, second, or third class, issued orders under section 99.14 in three cities of the fourth class, and effected voluntary agreements in cities under the first three classes, to about 60 in number. At the present time milk orders are in force in some 35 markets, and elsewhere in the State numerous voluntary agreements are still operating since their adoption.^{28/}

Persons controlled or affected.- At the present time about 750 milk dealers are licensed by the department to engage in the business of dealing in fluid milk and cream, and are required to comply with the terms and conditions, including the schedules of prices, prescribed by the department. In addition, producers selling regulated milk in regulated markets are subject to the department's determinations with respect to prices to be paid by dealers, butterfat differentials, carriage charges, etc.; and consumers are required to pay for their regulated milk at not less than scheduled resale prices.

Classification for purpose of price determination.- From the producers' standpoint, the department classifies and prices milk according to its use in a market. The character of resale classification may be indicated by a recent schedule for the Milwaukee market. Included are: Regulated Market Milk, Vitamin D Regular Market Milk, Certified Milk, Certified Soft Curd Milk, Vitamin D Certified Milk, Special Milk; Cream (Light, Medium, Heavy, Hotel, over 32%, and Sour); Buttermilk, Bulgarian Buttermilk, Acidophilus, Flavored Drinks, Skim Milk, and Cottage Cheese (Creamed, and Plain). These items are priced at retail and at wholesale, and milk and cream in bulk, and in quarts, pints, and smaller sizes, and with the amount of butterfat content or the range of its variation defined; cottage cheese is likewise priced at wholesale and retail and according to the number of ounces in the glass or package, or the number of pounds in the package or in bulk. In addition, Regular Market Milk is priced, wholesale, for schools in pint and half-pint sizes, and Vitamin D Regular Market Milk, in half-pints only.

^{28/} Voluntary agreements applied, or if continued still apply, mostly to cities under 10,000 population. It was necessary that 100 percent of the dealers in such a market sign the agreement, otherwise it could not go into effect. An interesting feature of these agreements is that underselling is an unfair trade practice and that the department shall have jurisdiction under section 99.14 (now 100.20) to issue a cease and desist order with respect to such practice. See footnote 20 above.

Method of payment; base-rating and market-wide pooling.- Except in markets where market-wide pooling prevails, the method of payment to producers by the dealer is that of the individual-dealer pool. That is, each of his producers is paid the same figure per hundred-weight.^{29/} This figure is computed on the basis of the prices required to be paid by the dealer in the respective use-classifications in which his sales are actually made, and, in Wisconsin practice, is called the average or composite price. In some markets this method of payment is supplemented by the inclusion of base ratings as a mechanism for adjusting more closely fluid supply to effective demand - "overbase" milk being computed at a figure lower than for "within base" milk. In addition, market-wide pooling is carried on in one market. In this, the Madison, market all producers delivering milk thereto receive as the price for their milk "the pooled average price of the milk handled in the next preceding month by all dealers on the market." Computations are made by the Madison Milk Marketing Cooperative, Inc. (referred to as the Pool), which also acts as the collector and distributor of equalization accounts among the dealers of the market. The department requires that each "deficiency" dealer (who has received from the Pool his proportionate amount of equalization payments made by "excess" dealers) "shall not later than the 15th of each month use such payment from the Pool, together with other funds, to pay all of his producers for the next previous month's purchases in accordance with the Pool computation."

Trade practices.- The department has found authority for the adoption of rules with respect to trade practices under the permanent provisions of section 99.14 (now section 100.20), and has issued from time to time, after public hearings, a list of unfair practices entitled, "Standard of Fair Practices in Selling of Milk by Distributors," which shall be considered a part of all orders issued by the department. For example, among practices considered unfair in the standard adopted by the department July 18, 1935, are the following: (1) Giving free samples; (2) selling under false descriptions, advertising or trade names; (3) giving money, discounts, milk, or other things of value to any hotel, apartment or factory-owner, manager, janitor, clerk, maid, or other person, "for either business or information or assistance in procuring business; and each distributor shall discharge any employee guilty of such unfair practice"; (4) paying premiums or allowing any discounts to new customers; (5) furnishing customers "under any circumstances" (by gift, loan, sale, etc.) ice boxes, ice or other devices or means for refrigeration or insulation; (6) using another distributor's bottles, cans or cases; (7) using as a solicitor any person other than a regular employee; (8) placing a salesman or driver on a route "which within one year previously he has covered in whole or

^{29/} Subject only to any butterfat differentials, transportation charges, authorized deductions, etc.

in part for another distributor"; (9) soliciting or selling by any distributor for himself or as agent for another on any route which within one year previously he has covered in any capacity for another distributor; (10) selling milk or cream over the counter to the retail trade other than at the retail prices provided for in the order. In addition, four items not designated as unfair practices are included: (1) Every dealer shall pay for all milk received by him during the month not later than the 20th day of the following month; (2) every dealer shall pay for all milk he receives by actual weight and actual test; (3) no dealer receiving milk from a producer through an independent milk hauler shall charge such producer a greater sum for hauling than is actually paid such hauler; and (4) no dealer shall sell to any peddler who does not own or maintain "a plant holding a board of health permit for processing and bottling milk for distribution."^{30/}

Records and reports.- Each dealer required by law to be licensed is ordered by the department to mail to it, not later than the 20th of each month, report for the previous month, giving the information required by forms furnished by the department. Such information consists, in part, of the following: (1) Total pounds of milk bought in all classes or produced on farm; (2) pounds bought as "Over base or Criticized Milk"; (3) pounds of "Emergency Milk" bought and from whom; (4) total pounds sold as "Fluid Milk," including sales to other dealers as "Relief" and "Regular Fluid" milk, in the form of gallons (bulk), quarts, pints, and half-pints; (5) the same kind of information with respect to "Cream Milk," as in the case of (4) next above; (6) "fluid milk" price per 100 pounds for regular fluid milk and for relief milk; (7) "cream milk" price per 100 pounds; (8) "manufactured or surplus milk" price per 100 pounds; (9) "average price" paid per 100 pounds for milk testing 3.5 percent butterfat (directions given as how to determine such price from other items in the report); (10) percentage used, respectively, as "fluid milk," "cream milk," and "manufactured or surplus milk"; and (11) total amount of (a) "regulation deductions" for the "Milk Control Fund" and (b) "advertising deductions" for the "Milk Advertising Fund," respectively paid "herewith" at rate of one cent per 100 pounds of "fluid milk and cream sales." Noticeable are the specific, clearcut directions, included in the report, with respect to the act, certain regulations thereunder, and the methods to be used by the dealer in figuring percentages of milk used (under (10) above), in figuring "average price," etc.

Dealer and employee relations.- In furtherance of its desire to remove wherever possible unfair competitive advantages held or sought by milk dealers, the department has taken into consideration the question of adequacy or inadequacy of wages paid by dealers - a matter of some practical importance, because with such unemployment workers were found willing to accept almost any wages offered.^{31/} Differences arising

^{30/} (4) shall not be construed to prevent a storekeeper from making household deliveries.

^{31/} Authority for this is found in the paper by Former Commissioner F. Schultheiss, entitled: "Fluid Milk Market Stabilization in Wisconsin."

between employer and employee have been placed before the Regional Labor Board for arbitration, and through this board a standardization of wages has been effected through the institution of minimum wage scales for route drivers, route riders, foremen, plant men, and all other employees as well.

PART THREE

Legal Status

The constitutionality of milk control statutes in Wisconsin has been upheld, the scope of the department's authority defined, by the Supreme Court of the State in at least two important decisions.

State v. Dairy Distributors, Inc., 258 N. W. 386. Opinion Jan. 8, 1935. Cause of action arose from defendant's failure (1) to pay prices as scheduled to producers, (2) to pay a volume assessment to be used in increasing milk consumption, and (3) to make monthly reports to the department.^{32/} One difficulty, the court pointed out, was that the department's order applied only to dealers "buying milk for resale," and that the defendant was a selling agency for the Watertown Cooperative Association and "in no sense a purchaser of the milk furnished by the members of the Watertown Cooperative." Defendant, therefore, was not included in the order and could not be required to pay the scheduled prices or to make reports - except as to certain purchases it had made of Grade A milk from sources other than the Watertown Cooperative or its members and with respect to which it had paid scheduled prices and had rendered reports.^{33/} As regards the volume assessment, the court held there was no authority, express or implied in the law, for such levy by the department upon the defendant or other dealers. The opinion constructively pointed out "that [legislative] intent should be expressed in clear and unmistakable terms." As for the commission (department), said the court, it "nowhere finds that the imposition of such an exaction is necessary to prevent discriminatory, unfair, or unreasonable methods of competition. . . . It does not find that a public emergency exists or that discriminatory, unfair, or unreasonable methods of competition are resorted to which result in unjust or unreasonable prices to the producer; nor that any practice indulged in eliminates, or tends to eliminate, competition."

^{32/} As required by General Order No. 34, of May 1, 1933, for the Milwaukee area.

^{33/} One result of this decision was to change, by the Act of 1935, the definition of dealer so as to include a cooperative association whether "buying for resale, or receiving, handling or selling, either personally or through an agent or as agent of another, either at wholesale or retail," and the same result is accomplished in the present act. See definition of "dealer" and "person" in footnotes 14 and 19, above.

State ex rel. Finnegan, Atty. Gen., et al. v. Lincoln Dairy Co., 265 N. W. 197.851. Opinions Feb. 4 and March 16, 1936.- The real purpose of this action, the court pointed out, was to test the constitutionality of the Milk Control Law and the Milk Dealers Law, of 1935. Cause of action arose from the undenied failure of the defendant to comply with provisions of General Order No. 34g issued by the department, including refusal to permit the department to examine its books. Upon the question of "emergency" the court said in part: "It is certainly not true to say that the unhealthful and undesirable conditions created or disclosed by a great economic crisis subside with the crisis. If the existence of an emergency has resulted in a deterioration of the quality of milk delivered, has resulted in discriminatory, unfair, or unreasonable methods of competition, and practices have been resorted to which tend to eliminate competition and resulted in injustices to the producer, it cannot be assumed that those practices will disappear even though indices may indicate that some phases of the economic crisis are passing."

Upon authority of the Tavern Code Case (264 N.W. 633), the court denied defendant's contention of an invalid delegation of legislative power to the department in conferring the power to make regulations relating to the sale and distribution of milk. Nor would it consider defendant's contention that the act was unconstitutional "because it is discriminatory in that it is declared to be immediately operative in certain cities while in the smaller cities it may become operative only at the option of the dealers or producers in those communities." To this the court said: "We do not consider the provisions of the section applicable to communities of less than five thousand population because if they be held invalid, they are separable and do not affect the validity of the act as a whole."^{34/}

Defendant's argument that the control act was invalid because falling within the category of so-called class legislation, was rejected. In part the court said: "In most cases when a legislature in the exercise of the police power, creates a classification in a regulatory statute some persons are benefited thereby and other persons may sustain a loss. Regulatory legislation is not subject to condemnation because as an incident to it benefits are conferred upon some class if there is as a matter of fact an adequate basis for the classification adopted." Contentions that the law was invalid because the milk industry is not subject to regulation in exercise of the police power and that price-fixing provisions are unconstitutional were rejected on authority of the Nebbia and Hageman Farms Corporation cases.^{35/}

^{34/} In the brief filed by the State it was admitted that this method of calling into being the power of the department to act as to the smaller communities only upon petition of a majority of producers or dealers would be invalid if the rules of the Gibson Auto Co. Case (259 N.W. 420) were applied, but it pointed out that the order resisted by the defendant applied to the Milwaukee market and did not involve the "option" feature in the act, and quoted previous words of the court, namely: "A constitutional question cannot be raised against a statute by one whose rights are not affected by it."

^{35/} 291 U.S. 502; 293 U.S. 165.

On motion for rehearing, March 16, 1936, defendant argued that the court had not passed upon its contention that the law was invalid because it established no standard in accordance with the rule laid down in the Gibson Case (cf. footnote 34). The court, pointing out certain wording in the act, declared: "These statutory provisions make clear what it is that is denounced by the law; unfair methods of competition which result in the elimination of competition and unfair methods of competition which result in an unjust or unreasonable price. Manifestly the orders of the commission [department] made pursuant to the provisions of this section must be directed to the elimination of these declared abuses. This furnishes a sufficient standard to sustain the delegation of power made to the commission." Motion for rehearing was denied.